

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling of The Alliance for Community Media, Et. Al.)	CSR-8126
)	
Petition for Declaratory Ruling of the City of Lansing, Michigan)	CSR-8127
)	
Petition for Declaratory Ruling Regarding Primary Jurisdiction Referral in <i>City of Dearborn et al. v.</i> <i>Comcast of Michigan III, Inc. et al.</i> of the City of Dearborn, Michigan, Et. Al.)	CSR-8128
)	
Petitions for Declaratory Ruling Regarding Public, Educational, and Governmental Programming)	MB Docket No. 09-13

**COMMENTS OF THE NATIONAL ASSOCIATION
OF TELECOMMUNICATIONS OFFICERS AND ADVISORS,
THE NATIONAL ASSOCIATION OF COUNTIES,
THE NATIONAL LEAGUE OF CITIES,
AND THE U.S. CONFERENCE OF MAYORS,
IN RESPONSE TO THE CONSOLIDATED PETITIONS
FOR DECLARATORY RULING**

I. INTRODUCTION

The National Association of Telecommunications Officers and Advisors, the National Association of Counties, the National League of Cities, and the U.S. Conference of Mayors (“Commenters”) submit these comments in response to the consolidated Petitions for Declaratory Ruling Regarding Public, Educational, and Governmental Programming (“Consolidated Petitions”), released February 6, 2009 in the above-captioned proceeding. Commenters support and urge the Commission to grant all three petitions.

NATOA's membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer communications policy and the provision of services for the nation's local governments.

NACo is the only national organization that represents county governments in the United States. It serves as a national advocate for counties; acts as a liaison with other levels of government; and provides legislative, research, technical and public affairs assistance to its members.

NLC is the nation's oldest and largest organization devoted to strengthening and promoting cities as centers of opportunity, leadership and governance. NLC is a resource and advocate for more than 1,600 member cities and the 49 state municipal leagues, representing 19,000 cities and towns and more than 218 million Americans.

USCM is the official nonpartisan organization of the nation's 1,183 U.S. cities with populations of 30,000 or more. Its mission is to promote effective national urban/suburban policy, strengthen federal-city relationships and ensure that federal policy meets urban needs.

As a preliminary matter, Commenters would urge the Commission to be as expeditious as possible in acting on all three Petitions. Commenters respectfully asks the Commission to bear the time sensitivity of these questions in mind throughout this proceeding.

Secondly, Commenters would like to point out that while all three of the above captioned proceedings involve discriminatory treatment against PEG channels, the specific actions alleged in each Petition are wide-ranging and vary between the actions of Comcast and AT&T. Commenters appreciate the Commission's efforts in taking on such a wide swath of PEG discrimination issues, but caution that each problem identified by the separate Petitions necessitate individual treatment.

II. SUMMARY

Commenters respectfully ask the Commission to endorse the ruling of the District Court of Connecticut that AT&T is a “cable operator” providing “cable service” over a “cable system” and require AT&T’s U-Verse product to comply with the rules and regulations promulgated under Title VI of the Act, as amended. In doing so, we ask the Commission to find that AT&T fails to provide channel capacity as required under § 611(a) of the Act, is imposing impermissible editorial control under § 611(e) of the Act, and fails to pass through closed captioning provided by PEG programmers as required under Commission Rule 76.606.

Commenters also ask the Commission to answer the questions of the District Court for the Eastern District of Michigan in a manner most favorable to the preservation of PEG channels. Specifically, we ask the Commission to find that Comcast’s proposed digitization of PEG channels fails to provide for PEG channel carriage in the basic service tier, as required by § 623(b)(7)(A)(ii). We also ask that the Commission find the imposition of additional burdens placed on the receipt of PEG channels be deemed discriminatory treatment of PEG channels in a manner inconsistent with § 611(a) of the Act.

II. AT&T IS SUBJECT TO TITLE VI REGULATION UNDER THE ACT

The issues raised by ACM, et. al. and the City of Lansing in relation to AT&T’s “Channel 99” PEG product implicate a number of protections contained within Title VI of the Act, as amended. AT&T, for its part, has made numerous attempts to color its U-Verse product as something other than a Title VI cable service while simultaneously taking advantage of all of the benefits that are extended to cable operators under Title VI. At the outset, should the Commission decide not to impose Title VI regulatory requirement upon AT&T, Commenters

would urge the Commission to also bar AT&T from relying on the protections afforded by the Title, including cable franchising, must carry, and program access provisions.

The question of whether U-Verse falls under the ambit of “cable service” for the purpose of Title VI regulation has already been fully and cogently addressed, however, by the federal district court for the district of Connecticut. The case, *Office of Consumer Counsel v. Southern New England Telephone d/b/a AT&T Connecticut, Inc.*, 515 F.Supp.2d 269 (D. Conn 2007), *reconsideration denied* by 514 F.Supp.2d 345 (D. Conn. 2008), *motion to amend entry of final judgment denied* by 565 F.Supp.2d 384 (D. Conn. 2008), is the only known case to address the question of whether AT&T’s U-Verse service is a “cable service” under Title VI.

The case stemmed from a determination by Connecticut’s Department of Public Utility Control (DUPC) that U-Verse was not required to seek a cable franchise to offer U-Verse video service because the DUPC felt that U-Verse was “merely another form of data byte stream,” and therefore not required to comply with franchising requirements found in Title VI.¹ This decision was challenged by the Office of Consumer Counsel for the State of Connecticut, along with the New England Cable and Telecommunications Association, in the district court for Connecticut.

In reviewing the findings of the DPUC, the Court first looked to the relevant statutory language regarding what constitutes a “cable service” under Title VI, and then applied traditional canons of statutory interpretation to answer the question of whether U-Verse is a “cable service.”² In conducting a thorough interpretation, the Court referred back to the legislative histories of the 1984 and 1992 Cable Acts, looking to find what Congress contemplated would be considered part of “(A) the one-way transmission to subscribers of (i) video programming, or

¹ *Consumer Counsel* at 273, *citing DPUC Decision*.

² *Id.* at 275-281.

(ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of video programming or other programming service.”³

In its discussion, the Court began by stating that “[t]he statutory language itself appears to require the conclusion that AT&T’s video programming service does constitute a “cable service,” as defined by the Cable Act.”⁴ The Court made this determination based on AT&T’s own acknowledgement that the flow of video programming over the U-Verse system is “one-way,” originating at AT&T’s servers and terminating at the consumer premises. The Court then goes on to conclude that the two-way transmission of data between the servers and the set-top box is not excluded by the definition.⁵

By looking to the legislative history of the 1984 Cable Act, the Court found that certain two-way transmissions of data were contemplated by Congress in the “cable service” definition and considered part of a cable service. The Court reasoned that Congress intended the reference to one-way transmissions to refer to “the nature of the service provided.”⁶ This approach encompassed the realization that some services, such as pay-per-view, could require some two-way transmissions, in order to “select or use” video programming while still remaining primarily a one-way transmission of video programming.

The Court next turned to the statutory reference to “subscriber interaction,” and what Congress meant to include as part of a cable service. Referring to the 1984 House Report, the Court found Congress intended to let cable systems “send[] a signal from the subscriber premises

³ 47 USC § 522(6).

⁴ *Consumer Counsel* at 276.

⁵ *Id.* at 277.

⁶ *Id.*, citing 1984 U.S.C.C.A.N. at p. 4680.

to the cable operator over the cable system” while still being within the bounds of the definition of “cable service.”⁷

Finding that Congress intended to look at the nature of the service provided, along with permitting some two-way transmissions across a cable service for the purpose of selecting or using that video service, the Court proceeded to point out that the required level of subscriber interaction needed to access AT&T’s video programming was no different in substance than that needed with a more traditional incumbent operator’s cable service, hence making the nature of AT&T’s service essentially the same as incumbent cable operator’s service.⁸

The Court then addressed AT&T’s claim that, under the Commission’s Cable Modem Ruling, U-Verse was not a “cable service” because it provided the requisite “high degree” of interactivity to exclude it for the “cable service” definition.⁹ The Court roundly rejected the argument, concluding that U-Verse “requires no more interactivity on the part of a subscriber than that involved in traditional CATV service.”¹⁰ The Court also pointed to the fact that, in the Commission’s Cable Modem decision, the Commission had specifically contemplated that the level of interactivity required by U-Verse would be included in the definition of a “cable service.”¹¹

AT&T next argued that, by only sending one channel at a time to consumers across its network, its service was not a cable service that delivered all of its programming to the consumer at once, and also that its product individually tailored its offerings based on the consumer’s request for a specific channel.¹² The Court once more rejected AT&T’s arguments, since

⁷ *Id.* at 278, citing H.R.Rep. No. 98-934 at 43.

⁸ *Consumer Counsel* at 278.

⁹ *Id.* at 278-79.

¹⁰ *Id.* at 279 (footnote omitted).

¹¹ *Id.* citing *In re Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4835 (F.C.C. 2002)(footnote omitted).

¹² *Id.* at 279-280.

U-Verse still made video programming “generally available to all subscribers,” which is the threshold question for purposes of the Cable Act.¹³ Finally, AT&T attempted to make the case that U-Verse is an information service, relying on the Commission’s Free World Dialup decision.¹⁴ The Court rejected this argument as well, noting both the dramatic differences between AT&T’s U-Verse and Free World Dialup services and the narrow scope of the Commission’s Free World Dialup holding.¹⁵

In short, having considered AT&T’s litany of arguments as to why its U-Verse multichannel video service should not be considered a “cable service” for purposes of Title VI regulation, the Court rejected every one, holding that the statutory language, legislative history, and very nature of U-Verse service all pointed toward finding U-Verse is, in fact, a “cable service.” The Court went on to use this holding as basis for also finding AT&T is a “cable operator” using a “cable system,” closing the loop on the proper regulatory treatment for U-Verse service.

The Commission should, at the outset, endorse the *Consumer Counsel* court’s ruling that U-Verse is a Title VI “cable service,” and under such designation require AT&T to comply with all relevant provisions of Title VI as it pertains to PEG channel carriage.

III. AT&T IS DISCRIMINATING AGAINST PEG CHANNELS

With the proper regulatory treatment for AT&T’s U-Verse service established under Title VI, there are a number of areas in which AT&T’s treatment of PEG channels is discriminatory.

¹³ *Id. citing* H.R.Rep. No. 98-934 at 43.

¹⁴ *Id.* at 280, *citing* In re Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service, 19 F.C.C.R. 3307 (F.C.C. 2004).

¹⁵ *Id.* at 281, footnote 8.

A. AT&T Fails to Provide Channel Capacity Required Under § 611 of the Act

Section 611 of the Act speaks to the ability of a franchising authority to set requirements for the “designation or use of channel capacity for public, educational, or governmental use” as permitted by the Act. “Channel,” as defined by § 602(4) of the Act, is “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel,” the definition of which was left to the Commission. The regulations, in turn, defined a “television channel” as “[a] band of frequencies 6MHz wide in the television broadcast band.”¹⁶ So, taken as a whole, when a franchise requires AT&T to provide a channel, without more,¹⁷ AT&T is required to provide PEG channels so that any information that could be provided in a 6MHz band is delivered to the subscriber, or more simply, so the signal is the same as a television signal.

This, however, is not the case with AT&T’s “Channel 99 PEG product.” Instead, AT&T relegates PEG programming into a multi-step menu driven system which offers inferior video quality than other channels on AT&T’s U-Verse service, while stripping out closed captioning and secondary audio programming (SAP) functionality. The aggregation of every PEG channel into an application separate from all other video channels simply fails to meet the requirements set forth in Title VI or in the Commission’s own regulations as they pertain to what constitutes a channel. The Commission should make clear that PEG channels are to be afforded the same kind of channel capacity being used by other commercial channels.

¹⁶ 47 C.F.R. § 73.681.

¹⁷ Section 611(c) would permit a franchising authority and a cable operator to agree to provide other types of capacity on a system, such as capacity for an audio channel.

B. AT&T Is Exercising Editorial Control Over PEG Programmers, Which is Prohibited by Section 611(e) of the Act

Section 611(e) clearly states that “a cable operator shall not exercise any editorial control” over PEG channels, with the lone exception applying to obscenity, indecency, or nudity. “Editorial” takes its roots from “editor,” which in turn stems from the word “edit,” defined as “to prepare (motion-picture film, video or magnetic tape) by deleting, arranging, and splicing, by synchronizing the sound record with the film, etc.”¹⁸ “Control” is defined as “to exercise restraint or direction over.”¹⁹ Taken together, “editorial control” is to exercise restraint or direction over the deletion, arrangement, splicing, and synchronization of video content.

As applied here, AT&T’s decision to remove closed captioning content, secondary audio programming (“SAP”) and other features of PEG programming can only be characterized as editorial control. This is especially true in the case of SAP, where numerous PEG programmers use SAP to provide important public services to subscribers, especially for those subscribers who are visually impaired. Removal of SAP is a de facto stripping of program content as received from the PEG programmer. Further still, the availability of only open captioning for those PEG programmers who wish to offer captions amounts to an arranging of content, in that AT&T has made the editorial choice to remove the closed captioning capability that was included in the PEG programming it receives. Both sets of action amount to editorial control, which is prohibited under § 611(e) of the Act.

¹⁸ "edit." *Dictionary.com Unabridged (v 1.1)*. Random House, Inc. 04 Mar. 2009. <[Dictionary.com http://dictionary.reference.com/browse/edit](http://dictionary.reference.com/browse/edit)>.

¹⁹ "control." *Dictionary.com Unabridged (v 1.1)*. Random House, Inc. 04 Mar. 2009. <[Dictionary.com http://dictionary.reference.com/browse/control](http://dictionary.reference.com/browse/control)>.

C. By Failing To Pass Through Closed Captioning Provided by PEG Programmers, AT&T is Violating § 76.606 of the Commission's Rules

Under § 76.606 of the Commission's Rules, cable operators must pass closed captioning through to consumers as it was received from the programmer. AT&T's "Channel 99 PEG product," however, does not accomplish this as it relates to PEG programmers. Instead, where a PEG programmer wishes to provide closed captioning with a program, AT&T transforms it into open captioning – an always-on service which obstructs part of the screen constantly. There is no provision or regulation that allows a cable service provider to simply convert closed captioning into open captioning, regardless of how the program was received, nor does the provision of open captioning obviate the need to pass through closed captioning. Therefore, AT&T's current method of providing captioning fails to pass muster under the Commission's rules.

D. AT&T Discriminates Against PEG in a Manner Inconsistent with the Intent of Congress

Congress intended that PEG channels be accessible on a non-discriminatory basis to the community – a sentiment borne out in the legislative history of the 1992 Cable Act.²⁰ Coupled with the requirement to provide channel capacity to PEG programmers equivalent to that provided to commercial broadcasters, Congress clearly established that PEG was to be treated no differently than other channels carried on a cable system. AT&T's system, however is discriminatory against PEG on a number of fronts.

The injection of additional multi-step menus that are required to access programs, where commercial channels need only to have their number entered, drastically alters the navigability of PEG programming. The video quality of AT&T's PEG product is markedly lower than

²⁰ Petition of ACM, et. al. at 25 *citing* H.R.Rep. 102-628 at 85.

commercial channels.²¹ Closed captioning is not passed through as provided by PEG programmers. SAP audio is stripped from programs, removing important content and information beyond that provided in the primary audio. Standing alone, any one of these shortcomings would amount to discrimination against PEG. Together, these problems have pervasively, and adversely, impacted community access to and use of PEG programming.

IV. COMCAST IS ATTEMPTING TO DISCRIMINATE AGAINST PEG CHANNELS

As it relates to PEG discrimination, Comcast would like to attempt several actions that would directly discriminate against PEG channels. While a more thorough treatment of these actions can be found in the Petition filed by Dearborn, Michigan et. al.,²² a summary is provided here:

- Digitizing PEG channels, and not the entire basic service tier.
- Requiring consumers to affirmatively contact Comcast and request the required set-top box.
- Requiring subscribers to pay an additional fee, beyond that charged for the rest of the basic service tier, to receive PEG channels that were previously available in the same manner as every other basic service tier channel.
- Failing to reduce the rate paid for the remaining analog basic service tier.
- Moving PEG channels from their previous channel location into the 900-series of channels, far removed from the basic service tier numbering.

In order to better understand the significance and legal implications of what Comcast has proposed, the Court for the Eastern District of Michigan has referenced seven questions to the Commission in an effort to resolve the litigation that gave rise to the Petition of Dearborn, Michigan, et.al. The text of each question was provided in the Petition. These comments will address the responses contained within the Petition.

A. The Correct Perspective for Identifying Discriminatory Treatment Against PEG Channels and Basic Service Tier Criteria is That of the Consumer

²¹ See ACM et. al. Petition, Exhibit G, *Delivery of PEG Programming at Commercial Quality*, September 2, 2008.

²² Petition of Dearborn, Michigan et.al. at 3-4.

As discussed in III.D., *supra*, the context from which any determination regarding the placement of a PEG channel on the basic service tier, or discrimination against that PEG channel, is from the perspective of the consumer who receives the cable service. This approach, evinced in *NCTA v. Brand X Internet Servs.*, 545 U.S. 967 (2005), appropriately places the analytical focus on those who are most impacted by the actions of a cable operator as it relates to channel placement and treatment.

On the particular issue of basic service tier criteria, a straightforward proposition exists for determining whether, from the consumer perspective, a channel or channels are included in the basic service tier. Simply, in order for a consumer to receive PEG channels, must the consumer take any additional action or pay any additional fee above that needed to receive commercial broadcast channels on the basic service tier in order to access PEG channels? If the answer is yes, then the PEG channels are not part of the basic service tier. This intuitive approach provides a simple answer not only to the actions specifically implicated by the Dearborn petition, but to any question of whether a channel is located in the basic service tier.

B. Comcast's Planned Digitization of PEG Channels Would Remove PEG From the Basic Service Tier

In order for consumers to continue to receive PEG channels, they would be required to take a number of steps not required to access the rest of the basic service tier, at a cost above that of the basic service tier. Once a consumer has undertaken these additional burdens, they will quickly discover that where PEG channels were once located in close proximity to commercial broadcast channels, they are now positioned in the 900-series of channels. The imposition of these additional burdens is far afield from the intent of Congress, which drafted § 623(b)(7)(A) of the Act specifically to ensure that PEG channels received the same treatment as commercial broadcast channels as part of the basic service tier. In sum, Comcast's proposed actions would

remove PEG channels from the basic service tier, something prohibited by § 623(b)(7)(A) of the Act.

C. By Imposing Additional Burdens on PEG Channels That are Not Imposed on Other Basic Service Tier Channels, Comcast is Discriminating Against PEG Channels

The myriad actions Comcast would take against PEG channels directly undercut the statutory obligation imposed on cable operators to designate channel capacity for PEG under § 611 of the Act, and amount to discriminatory treatment against PEG. On every level, requiring consumers to not only take additional affirmative steps to continue receive PEG channels, but to impose an additional cost beyond that already paid for the basic service tier is discriminatory, especially where the remaining basic service channels do not suffer the weight of these burdens.

This discriminatory treatment also has an additional adverse impact on those who most badly need the content provided by PEG channels: Shut-ins and the economically disadvantaged. Whether it is being able to watch local government proceedings on a PEG channel that a member of the physically disabled community cannot attend in person, or obtaining pertinent educational information from a PEG channel where taking time off to attend classes is simply impossible, the burdens placed on the receipt of PEG channels would harm those persons who are most in need of easy access to PEG channels in their community.

By requiring additional calls, equipment, and costs, Comcast would discriminate against PEG channels in a manner that is inconsistent with the intent of § 611 of the Act.

V. CONCLUSION

For the foregoing reasons, Commenters respectfully ask that the Commission grant all three petitions, and take any and all additional necessary steps to preserve PEG channels on both AT&T's U-Verse and on Comcast's system, prevent discriminatory treatment of PEG channels, and ensure carriage of PEG channels in the basic service tier.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John D. Russell, certify that a copy of the comments of the National Association for Telecommunications Officers and Advisors, the National League of Cities, the National Association of Counties, and the U.S. Conference of Mayors were served 9th day of March, 2009, upon the following:

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